United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

ORIGINAL WITH PROOF OF SERVICE

76-6191

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellee-Appellant,

and

JOSEPHINE McGEE,

Plaintiff-Intervenor-Appellee-Appellant,

-against-

KALLIR, PHILIPS, ROSS, INCORPORATED,

Defendant-Appellant-Appellee.

ON APPEAL FROM A FINAL ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

AMICUS BRIEF ON BEHALF OF DEFENDANT-APPELLANT-APPELLEE

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STATEMENT

This appeal involves an action for damages brought by a former employee of an advertising agency who was discharged when she involved an important client in proceedings to determine whether her employer was guilty of discrimination against her on the basis of sex. Because of the serious consequences which the imposition of liability on the employer in the present case may have on the advertising industry, in limiting the response which management may take to protect delicate client relationships, this amicus brief is filed to urge reversal of the order below.

The present action originated in a charge of sex discrimination against defendants Kallir, Philips, Ross, Inc. (K.P.R.) by an employee, Josephine McGee. It is established that K.P.R. did not treat McGee any differently as a result of the filing of her charge. However, at a hearing before the New York City Commission of Human Rights, it was revealed that McGee had solicited a letter to be used in the proceedings from an employee of Upjohn, one of K.P.R.'s most important clients. Around this time, K.P.R. also became aware of a divisive attitude which McGee had displayed at a presentation before Upjohn. Deciding that McGee's value as an employee had been seriously undermined by these events, K.P.R. terminated her employment.

POINT I

MANAGEMENT DECISIONS MADE IN GOOD FAITH WITH THE AIM OF SAFEGUARDING A BUSINESS RELATIONSHIP DO NOT CONSTITUTE RETALIATION WITHIN THE MEANING OF THE CIVIL RIGHTS ACT.

This case presents a serious question as to the degree of harm which an employee may inflict on his employer in exercising the right protected by § 704(a) of Title VII, 42 U.S.C. § 2000e-3(a), to assist or participate in an investigation concerning alleged discrimination. In the present case potentially irreparable harm existed by virtue of the danger of damaging client relationship and by the creation of internal divisiveness by plaintiff McGee.

Section 704(a) provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees...because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Nevertheless, the scope of an employee's conduct in exercising his § 704 rights is not unlimited. As Judge Weinfeld noted in his decision below:

> Under some circumstances, an employee's conduct in gathering or attempting to

> gather evidence to support his charge may be so excessive and so deliberately calculated to inflict needless economic hardship on the employer that the employee loses the protection of section 704(a), just as other legitimate civil rights activities lose the protection of section 704(a) when they progress to the point of deliberate and unlawful conduct against the employer.

E.E.O.C. v. Kallir, Philips, Ross, Inc., 401 F. Supp. 66, 71-72 (S.D.N.Y. 1975). Judge Weinfeld was certainly correct in his observation on this point. He committed clear error, however, in failing to recognize the delicate nature of client relationship in the advertising industry and that, in this context, an employee's knowing and deliberate involvement of a client in the controversy over alleged discrimination was so eggregious as to warrant her discharge.

An advertising agency holds itself out as possessing a high professional skill which it has the duty to utilize on behalf of its client. Its employees are required to exercise extreme diligence in cooperating with the client. Of this duty of cooperative effort, it has been said:

> This area of duties requires real team spirit and a conscious joint effort. For the advertiser as principal has the perfect right to disapprove campaign plans or any other proposals of the advertising agency for the sole and sufficient reason that it dislike it or finds it not to its taste.

G.E. & P.E. Rosden, I Law of Advertising § 1.07[1][g].

Thus, the nature of advertising requires that everything possible be done to assure the client that the agency is trustworthy and possesses the stability to render competent service. From this unique perspective, a firm in the advertising industry, more so than in normal commercial activity, must be constant in its efforts to create an impression of a united cooperative organization, and must always avoid burdening the client with unnecessary problems. The reluctance of advertising firms, to engage in litigation, for example, is well known. See Law of Advertising, supra, § 1.05[2][b][2].

While § 704(a) is to be broadly construed to protect the rights of employees under Title VII, it is still true that a determination regarding retaliation necessarily requires reference to the subjective intent of the employer in discharging an employee. As stated by the District Court in Goodloe v. Martin Mariettta Corp., 7 F.E.P. Cases 965 (D. Cal. 1972):

> The E.E.O.C. should have decided and we shall decide whether there has been discrimination or retaliation under the Civil Rights laws, and in making this decision it should have considered and we shall consider not whether the company's judgment was right or wrong, but whether it was reasonable and in good faith.

7 F.E.P. Cases at 966.

Judge Weinfeld's decision below places great reliance on the fact that the advertising firm's relationship with its

client was ultimately unaffected by the actions of the employee. However, this ignores the potential threat which any agency would reasonably perceive in the involvement of client personnel in an internal dispute. It simply cannot be the law that employers are powerless to act, in the face of eggregarious conduct such as that exhibited in the present case, until after the disastrous results which such conduct may reasonably be expected to produce actually occurs.

In the present case, the employee herself recognized the necessity of maintaining client relationships at an optimum level and admitted that one should never take a problem to a client. Nevertheless, even though she had broadly based contacts in the medical advertising field, she chose to approach an employee of a client for a job description. No attempt had been made to obtain such a document from within her employer's organization or from another independent source. The agency's completely reasonable reaction was to perceive this as an attempt to bring outside pressure to bear, with the goal of obtaining a settlement in the proceedings before the N.Y.C.C.H.R.

This unethical conduct by an employee, however, is only the preface of what may occur if the decision below is allowed to stand as valid precedent. Employers--especially those in sensitive areas such as advertising--will be at the complete mercy of unscrupulous or whimsical employees who, for whatever reason, and however wrongly, feel that they are the

victims of discrimination. It must be rememebered that there are no moral restraints, such as that which the professional advice of an attorney might provide, on the activity which such employees might engage in, while they are "participating in" or "investigating" discrimination under § 704(a). Nor are there established guidelines by which the more scrupulous employees might police themselves. A disgruntled employee may, therefore, make a baseless charge of discrimination and, under the guise of investigating the matter, systematically harass his employer's clients until the employer capitulates and agrees to settle with the employee. This sort of blackmail cannot be tolerated, but it will occur under the standards employed by the District Court in the present case.

Even absent dishonest motives by an employee, an employer should not be required to carry an employee whose usefulness has ended because of the employee's arbitrary and damaging conduct. In the present case, for example, the employee's action in obtaining the Korzillius letter occurred in the context of her increasingly disruptive influence within the agency. It is clear that an employer's dismissal of an employee, which is predicated on the employee's disruptive conduct, does not constitute retaliation prohibited by § 704(a). See Garrett v. Mobil Oil Corp., 531 F.2d 892 (8th Cir. 1976); Barnes v. Lerner Shops, Inc., 323 F. Supp. 617 (S.D. Tex. 1971); E.E.O.E. v. Del Rio National Bank, 12 F.E.P. Cases 1668 (W.D. Tex.

1975); United States v. Hayes International Corp., 6 F.E.P. Cases 328 (_____, 19___). Moreover, the employee's divisiveness in the present case was not limited to internal agency matters. Thus, during presentations prepared by the agency, it became apparent to the client that dissension existed between the charging employee and other employees. In the employer's view the letter solicited by the employee was another in a continuing pattern of incidents which caused it to doubt her loyalty. Finding its confidence in an employee has been eroded to such a point that the value of her services was questionable, any advertising firm would have pursued the only reasonable alternative available in this situation and terminated her employment.

Judge Weinfeld's decision below fails to take into consideration the employer's perception and evaluation of the deterioration in value of the employee's services from the standpoint and judgment of a business in the advertising industry. To affirm the decision below would be to recognize the principle that, once an employee has filed a charge of discrimination, his employment is protected, no matter how valueless his services may become to the employer. The intent of § 704(a) is to shield employees from being discharged as the result of exercising their right to challenge an allegedly discriminatory practice. However, the section was never intended to freeze the employment relationship when the employee's services are no longer of value.

Employers should not be faced with the severe alternative of risking their economic welfare or maintaining an unneeded employee on the payroll merely because a civil rights claim has been filed. Affirmance of Judge Weinfeld's decision, however, would foreclose the third alternative of discharging the employee when the circumstances reasonably required it. Judge Weinfeld's conclusion that McGee's dismissal in the present case constituted a retaliation prohibited by § 704(a) should be reversed, thus making it clear that an agency like K.P.R. has the right to make a good faith determination that the dismissal of an employee is necessary in order to safeguard its legitimate business interests.

POINT II

DISCHARGE OF AN EMPLOYEE IS LEGAL WHERE IT IS PREDICATED ON LEGITIMATE REASONS EVEN THOUGH RETALIATORY MOTIVES MAY HAVE BEEN PRESENT.

McGee's involvement of a client in an internal dispute and her divisive behavior at agency presentations would, by themselves, have justified her dismissal by any firm in the advertising field. In this regard, Judge Weinfeld's finding that a motive for her termination was the fact that she discussed her charges of discrimination with fellow employees is merely supplemental. Even if correct, it would not sustain the result below, since McGee would have been fired in any case. In Kiag v. Laborers International Union of North America, 443 F.2d 273 (6th Cir. 1971), the court stated:

> [I]f one is unlawfully discriminated against in violation of Title VII, an employer need not reinstate him or grant him back pay if it can be shown that the employer also had a lawful non-discriminatory motivation for his actions which when considered by itself would have caused the same results as his discriminatory purpose.

443 F.2d at 278.

Where an employer finds it necessary to terminate an employee, and may legitimately do so, it is necessary that

it be allowed to do so without the fear that some other aspect of the employee's behavior, to which he objects, is protected against retaliation. To effectuate legitimate management perogatives, the judgment against the employer in the present case should be reversed.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

SAM ADAMS, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 511 University Pl. New York, N. Y.

That on the 28th day of FEBRUARY, 1977, deponent personally served the within AMICUS BRIEF ON BEHALF OF DEFENDANT-APPELLANT-APPELLEE upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.~~

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

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Samuel Adams

Sworn to before me this
28th day of FEBRUARY, 19 77.

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1977